

Decision **DRAFT DECISION OF ALJ BROWN** (Mailed 5/10/2004)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Require
California Natural Gas and Electric Utilities to
Preserve Interstate Pipeline Capacity to
California.

Rulemaking 02-06-041
(Filed June 27, 2002)

OPINION DENYING INTERVENOR COMPENSATION

This decision denies the motion to accept a late-filed notice of intent (NOI) to claim compensation by The Utility Reform Network (TURN) and denies the concurrent request for an award of \$45,656.66 in intervenor compensation in connection with Decision (D.) 02-07-037 and D.03-04-061 and D.04-01-047. TURN did not timely file its NOI, and its motion comes after the proceeding was closed and more than 17 months after the due date for the NOI.

Background

On May 31, 2002, the Federal Energy Regulatory Commission (FERC) issued an order indicating that marketers currently serving California may turn back up to 725 MMcf/d of firm capacity on the El Paso pipeline to El Paso's east of California (EOC) customers.¹ This Commission was concerned that unless California replacement shippers or California utilities acquired the turned back capacity, it could be permanently lost to California. Because the FERC order required the EOC marketers to decide by July 31, 2002, how much capacity they

¹ El Paso Natural Gas Company, et al., 99 FERC Section 61,244 (2002).

would be turning back, the Commission expedited its rulemaking process and issued D.02-07-037 on July 27, 2002, requiring the natural gas and largest electric utilities to acquire the turned back capacity. This portion of the proceeding was considered “Phase I.”

A prehearing conference (PHC) was held on September 10, 2002, for Phase II, and then a scoping memo issued detailing the issues for Phase II. The parties filed testimony and rebuttal in April 2003, and evidentiary hearings were held April 28 through May 2, 2003. Opening briefs were filed July 7, 2003. TURN participated actively throughout the entire course of the proceeding.

D.04-01-047 established cost allocation methodologies for Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCalGas), Southern California Edison Company (Edison), Southwest Gas Corporation (Southwest Gas), and San Diego Gas & Electric Company (SDG&E) for the costs of the turned back capacity on El Paso Natural Gas Company’s (El Paso) interstate pipeline that the utilities were ordered to procure pursuant to D.02-07-037.

TURN’s NOI to seek compensation was due on October 10, 2002—30 days after September 10, 2002, when the assigned Administrative Law Judge (ALJ) held the PHC. However, TURN did not file its NOI until March 25, 2004, 17 months after the statutory deadline and after the proceeding was already closed.

Requirement for Awards of Compensation

The intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires that the intervenor satisfy all of the following procedures and criteria to obtain a compensation award:

1. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
2. The intervenor must satisfy certain procedural requirements including the filing of a sufficient NOI to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(b)(1).)
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(h), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

Because we deny the request, we will address only the timeliness of TURN’s NOI.

Untimely NOI

TURN filed its NOI on March 25, 2004, nearly two months after the third decision in this proceeding was final and more than 17 months after the due date for the NOI. TURN explains that because there were multiple phases in this proceeding, its attorney mistakenly assumed that the NOI had been filed.

In D.00-03-044, we also denied compensation to TURN because of an untimely NOI. There, as here, TURN did not file its NOI until after the

proceeding was completed. We stated the following in that decision, and reiterate it here, omitting citations but retaining emphasis in the original:

We reaffirmed the importance of the NOI in D.98-04-059, our Rulemaking examining the intervenor compensation process. . . . We made clear that applicants failing to meet the NOI requirement subsequent to April 23, 1998, when D.98-04-059 was effective, would face an uphill battle in establishing eligibility for compensation.

* * *

While D.98-04-059 did not hold that exceptions to the NOI filing requirement would never be granted, it stressed several benefits of the NOI requirement:

- “The information filed in the [NOI] should provide a basis for a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. . . . The nature and extent of the customer’s planned participation, in combination with the scope of the proceeding as detailed in the scoping memo ruling, should enable the presiding officer to make a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented.”

* * *

- “The statute requires the customer, at the stage where the Notice of Intent is filed, to provide a statement of the nature and extent of the customer’s planned participation. At this stage, the customer has therefore provided the Commission with the issue(s) it intends to address, as best as the customer can at that early stage of the proceeding.”

Moreover, it cannot be ignored that the NOI is a *statutory* requirement. Section 1804(a)(1) provides that “A customer who intends to seek an award under this article *shall*, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation.” (Emphasis added.)

While we have occasionally waived this requirement despite the statute's mandatory language, we indicated in D.98-04-059 that we would be reluctant to do so in the future. Furthermore, in the prior cited cases, the NOI was only a few days late, or, in the case of a new intervenor, 55 days late. Those cases cannot be likened to this one, in which TURN filed its NOI nine months after it was due. Moreover, in the [Southeast Alliance for Environmental Justice] Ruling, the intervenor was seeking compensation for the first time.

Even if we do have discretion to waive the NOI requirement in some cases, TURN does not invoke that portion of § 1804(a) that grants us such discretion. We may waive the deadline where, within the 30-day NOI filing period, a party cannot reasonably be expected to identify the issues as to which it will participate. However, TURN nowhere asserts that it was unable to identify such issues prior to November 12, 1998, the date on which it concedes its NOI was due. Rather, it bases its motion for late filing solely on attorney inadvertence.

We cannot, on this record, grant TURN's request. We will deny compensation in this proceeding.

The same reasoning supports denying TURN's request here, as we cannot find that TURN's late NOI is excusable. TURN is an experienced practitioner before this Commission, not a new intervenor unfamiliar with Commission rules and practices.

Comments on Draft Decision

Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment may be waived because this is an intervenor compensation decision. However, because we have denied TURN's request, we will allow TURN (and any other interested party) the normal 30-day period to comment on this decision.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Carol A. Brown is the assigned ALJ in this proceeding.

Finding of Fact

TURN filed its NOI belatedly and without adequate excuse on March 25, 2004.

Conclusion of Law

TURN's failure to file a timely NOI precludes an award of intervenor compensation to TURN for its participation in this proceeding.

O R D E R

IT IS ORDERED that:

1. The Motion to Accept Late-Filed Notice of Intent to Claim Intervenor Compensation of The Utility Reform Network, and the accompanying Request for Intervenor Compensation, are both denied.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision(s):	
Contribution Decision(s):	D0207037; D0304061; D0401047
Proceeding(s):	R0206041
Author:	ALJ Brown
Payer(s):	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network	March 25, 2004	\$45,656.66	\$0	Failure to file timely NOI

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
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